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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
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THE STATE OF ARIZONA, Appellee, v. STEPHEN WAYNE FOOTE, Appellant.	2 CA-CR 2008-0041 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071601

Honorable Barbara Sattler, Judge Pro Tempore

AFFIRMED

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Tucson
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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Stephen Foote was convicted of possession of a dangerous drug and possession of drug paraphernalia. He was placed on probation for a period of eighteen months. On appeal, Foote contends the trial court erred when it denied

his motion for judgment of acquittal made after the state had presented its evidence and renewed at the close of the evidence, insisting there was insufficient evidence he had possessed the methamphetamine officers found at the scene of the arrest.[1] We affirm.

¶2 A judgment of acquittal should only be granted when there is no substantial evidence to establish the elements of the charged offense. Ariz. R. Crim. P. 20(a); *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). We review the denial of a motion for a judgment of acquittal for an abuse of discretion and will reverse only if there is "a complete absence of probative facts to support a conviction." *Mathers*, 165 Ariz. at 66, 796 P.2d at 868. "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds, State v. Alvarez*, 213 Ariz. 467, 143 P.3d 668 (App. 2006). And "[i]n determining the sufficiency of the evidence to withstand a Rule 20 motion, we view the evidence in a light most favorable to sustaining the verdict." *State v. McCurdy*, 216 Ariz. 567, ¶ 14, 169 P.3d 931, 937 (App. 2007).

¶3 The state was required to establish Foote had possessed methamphetamine in violation of A.R.S. § 13-3407(A)(1). Section 13-105(30), A.R.S., defines "possess" as

[1]We note that when counsel made the initial motion for judgment of acquittal, she focused primarily on what she characterized as insufficient evidence of chain of custody to support the admission of the evidence, suggesting someone could have tampered with the evidence. But counsel subsequently stated that the facts were "unusual," the officer did not see "any baggies" initially but then found them where Foote had fallen. Thus, counsel appears to have been challenging the sufficiency of the evidence to show the baggies belonged to Foote, thereby preserving the issue for appeal.

"knowingly to have physical possession or otherwise to exercise dominion or control over property." Possession can be actual or constructive. *See State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998); *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). As Foote correctly points out in his reply brief, the state's theory in this case was that Foote had actually possessed the methamphetamine, not constructively. But like the elements of any offense, possession may be established by direct or circumstantial evidence. *Villalobos Alvarez*, 155 Ariz. at 245, 745 P.2d at 992. Foote asserts that the mere fact a person is near property does not establish the person "knowingly exercised dominion or control over it." *See State v. Cox*, 214 Ariz. 518, ¶ 10, 155 P.3d 357, 359 (App. 2007). Although we agree with this assertion, we conclude the state presented sufficient evidence supporting an inference that Foote had possessed the drugs.

¶4 Pima County Sheriff's Deputy Lorence Jove testified that, when he first saw Foote, he noted there were no lights or reflectors on the bike Foote was riding. As Jove approached, Foote turned on a flashing light. When Jove attempted to stop Foote, he fled. At one point Jove began to pursue Foote on foot, telling him "several times to stop" and threatening to deploy his "Taser" gun, but Foote continued to flee. Eventually, Foote rode into some cactus, struck a "downed tree," "up-ended over the . . . handlebars and fell on his stomach, chest and facial area into the patch" of cactus.

¶5 Foote was moving his hands "pretty rapidly" around the waistband of his pants and put his right hand inside the right pocket of his pants and then back in the front waistband of the pants. Jove demanded that Foote show his hands, testifying, "[I]t's a very,

very big safety concern as to what he is doing, what he is trying to pull out or conceal." After another officer arrived, Jove placed Foote in handcuffs and read him the *Miranda* warnings. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Foote told Jove he had fled because he had an "apparatus" in his pocket, which Jove understood to mean "a device used for smoking or ingesting illegal drugs such as crack cocaine or methamphetamine." Foote admitted to Jove the "apparatus" was in his right back pocket, and Jove reached into the pocket and took out the pipe that Jove recognized as one used to smoke methamphetamine and which contained methamphetamine residue.

¶6 Although Jove did not see Foote throw anything, "because of his odd behavior with moving his hands in front of him," Jove searched the area where Foote had fallen, finding two baggies that contained methamphetamine. Jove testified the baggies were "very clean[,] . . . not sun dried . . . not soiled . . . [and] not damaged whatsoever." And when Jove told Foote what he had found, Foote responded repeatedly, "'You didn't find that methamphetamine on me.'"

¶7 Foote testified the baggies were not his, he had not had a pipe for smoking methamphetamine, and he had not knowingly fled from a law enforcement officer. He testified he had been riding the bicycle, intending to return it to a friend from whom he had borrowed it, when the light on the bike had fallen off. He had stopped to reattach it and had then seen the bright headlights of a car coming toward him; he tried to get out of the way by "dash[ing]" across the street, and as he did, he heard the car accelerate. Foote denied seeing any emergency lights and had no idea why the person driving the car was pursuing him, but he subsequently realized it was a patrol car. He claims he then started to slow down but fell

into the cactus. He denied moving his hands and recalls the officer continuously told him the officer was going to "taze" him. He claims he sat on the ground and did not notice any baggies nearby. And, he denied the officer had found "anything illegal on [him]" including a pipe. He further denied "know[ing] anything about any baggies."

¶8 It is for the jury, as the trier of fact, to resolve conflicts in the evidence. *See State v. Manzanedo*, 210 Ariz. 292, ¶ 3, 110 P.3d 1026, 1027 (App. 2005). The jury was free to reject Foote's version of the events resulting in his arrest, and it appears to have done so here. *See State v. Dixon*, 216 Ariz. 18, ¶ 10, 162 P.3d 657, 660 (App. 2007). The jury readily could have believed, as we assume it did, that Foote was fleeing from Jove because he was carrying drugs and a pipe. And, reasonable jurors could not only have rejected Foote's testimony that no baggies had been next to where he had fallen, but they could have believed the baggies were there and belonged to Foote, who had removed and discarded them. There was sufficient evidence to support the inference that Foote had possessed the baggies.

¶9 Finally, Foote contends our supreme court's decision in *Carroll v. State*, 90 Ariz. 411, 368 P.2d 649 (1962), and this court's decision in *State v. Carr*, 8 Ariz. App. 300, 445 P.2d 857 (1968), require reversal of his conviction for possession of methamphetamine and that the state has not meaningfully distinguished them. We disagree. There was significantly more evidence to withstand the Rule 20 motion in this case than there was in either *Carroll* or *Carr*. Moreover, in *State v. Bullock*, 26 Ariz. App. 149, 546 P.2d 1158 (1976), we questioned the reversal of the conviction in *Carr*, stating, "[W]e think the decision in that case was strongly influenced by the then-current rule that a person could

not be convicted on circumstantial evidence alone unless such evidence was not only consistent with guilt, but inconsistent with every reasonable hypothesis of innocence." *Id*. at 153, 546 P.2d at 1162. We added, "[I]f this court were now presented with a conviction based on the facts of *Carr*, we would affirm." *Id*.

¶10 We conclude the trial court did not err in denying Foote's Rule 20 motion. We therefore affirm the convictions and the probationary terms imposed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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GARYE L. VÁSQUEZ, Judge

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J. WILLIAM BRAMMER, JR., Judge